BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 147 Federal Reporter (2nd Series), page 167 (Advance Sheet No. 2, issued April 2, 1945). It will be found on pages 58 to 61 of the Record. The findings of fact in the opinion of The Tax Court of the United States are not yet reported in the bound volume of The Tax Court of the United States Reports, but will be found on pages 30 to 42 of the Record.

II.

JURISDICTION

1. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Sec. 347 U. S. Code, Title 28.

2. The judgment of the Circuit Court of Appeals was entered on February 12, 1945, (R. 58, 62).

3. The nature of the case, the rulings of The Tax Court of the United States, and of the Circuit Court of Appeals for the Fifth Circuit, and the reasons why a writ of certiorari should be granted, are set forth in the foregoing petition.

III.

STATEMENT OF THE CASE AND QUESTION INVOLVED

The petition for the writ of certiorari contains a statement of the case and of the question involved, as well as of all the facts material to its consideration and determination.

IV.
SPECIFICATION OF ERRORS

The Circuit Court of Appeals for the Fifth Circuit, by affirming the judgment and decision of The Tax Court of the United States over the grounds of error assigned by the Petitioners, committed errors which Petitioners here assign in this Court as follows:

1. The Court erred in confining the cost basis of the property in question to the amount of $20,000.00 actually paid in cash, for purposes of computing depreciation and gain, and in disallowing, as a part of the cost, the amount of $24,567.16 represented by the six promissory notes, the cancellation of which was a part of the consideration for the conveyance to Petitioner Texas Auto Company. (Assigned in Circuit Court as Error I, R. 49).

2. The undisputed evidence, as shown by the stipulation, having shown that the cost of the property in question to Petitioner Texas Auto Company was $44,567.16, of which amount $25,000.00 represented the cost of the building, the Court erred in confining the **cost basis**, for purposes of computing depreciation and gain, to the amount of $20,000.00, and in allowing only $11,111.11 as cost of the building and only $8,888.89 as cost of the land. (Assigned in Circuit Court as Error II, R. 49).

V.
ARGUMENT

1. Cost Basis Under Revenue Act as Interpreted by The Tax Court and the Circuit Court.

The Petitioner Texas Auto Company, when referred to alone as the taxpayer, will be referred to as the Auto Company. Also, in view of the frequent references to the City National Bank of Corpus Christi, it will be referred to as the Bank, as in the opinions of The Tax Court and the Circuit Court.

The two specifications of error present the one question involved, i.e. whether or not the amount of $24,567.16 evidenced by the six promissory notes owed by Blacknall and his associates to the Bank, which the Bank and Pease (Pease being the owner of the Bank and likewise a substantial owner of the Auto Company) agreed to and did charge off and surrender to Blacknall as a part of the consideration for the latter's conveyance to the Auto Company, constituted a part of the original 1922 "cost" of the improved realty involved, for the purpose of determining depreciation and gain under the Revenue Act.

The Tax Court and the Circuit Court have held that the "cost" basis is limited to the amount of money actually paid out by the Auto Company for the property, i.e. $20,000.00 in retirement of the two $10,000.00 notes secured by liens thereagainst. The Tax Court stated (R. 36) "that is all the petitioners ever paid for the property" which became in the Circuit Court's opinion

> "The only consideration paid by the purchaser was $20,000.00." (R. 60).

In other words, both The Tax Court and the Circuit Court have held that the term "cost" as used in the applicable provisions of the Revenue Act is confined to "actual cost to the taxpayer," or more explicitly "net cost to the taxpayer."

No such restricted meaning of the term "cost" was intended under the Revenue Act, no such construction thereof has been accorded by the Courts, and such construction has been and is denied under the conflicting decisions cited in the foregoing petition for writ.

The applicable sections of the Revenue Act of 1938, identical in all respects with the corresponding sections of the 1936 Act which were before the Court in the Arundel-Brooks and Detroit Edison cases, cited supra as being in

conflict with the decision in the instant case, are as follows:

* * * * * * * *

"Sec. 23 Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(l) Depreciation. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *

"Sec. 113. Adjusted basis for determining gain or loss.

"(a) Basis (unadjusted) of property.

The basis of property shall be the cost of such property; except that—

* * * * * * * *

"(2) Gifts after December 31, 1920. If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that for the purpose of determining loss the basis shall be the basis so determined or the fair market value of the property at the time of the gift, whichever is lower. * * *

* * * * * * * *

(8) Property acquired by issuance of stock or as paid in surplus. If the property was acquired after December 31, 1920, by a corporation—

"(B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

* * * * * * * *

"(b) Adjusted basis. The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

"(1) General Rule. Proper adjustment in respect of property shall in all cases be made—

"(B) In respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws.

* * * * * * * *

"Sec. 114. Basis for Depreciation and Depletion.

"(a) Basis for Depreciation. The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any propery shall be the adjusted basis provided in Section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property."

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2. Conflict With The Arundel-Brooks and Detroit Edison Cases Discussed.

The direct conflict of the holding by the Circuit Court of Appeals for the Fourth Circuit in the case of Arundel-Brooks Concrete Corporation vs. Commissioner, 129 Federal (2d) 762, is immediately apparent. In the latter case it was held that

> "The total cost of the asset, not the net cost to the taxpayer, is the proper basis to be used in determining depreciation as well as gain or loss."

The Circuit Court of Appeals in the instant case has held that

> "The only consideration paid by the purchaser was $20,000.00," (R. 60).

In delimiting the Auto Company's cost basis to $20,000.00 the amount of the two secured notes actually paid off by the Auto company, The Court based its decision on the opinion of the Circuit Court of Appeals in the case of Detroit Edison Company vs. Commissioner, 131 Federal (2d) 619, which was affirmed by the Supreme Court in

319 U. S. 98 (R. 39), but the affirmance by the Supreme Court was not on any ground conflicting with the Arundel-Brooks case as to the point in issue.

The Circuit Court in the instant case did not cite any supporting authorities, but, having affirmed the decision of The Tax Court, it is presumed that it likewise relied upon the Detroit Edison case.

In so holding, we submit that The Tax Court and the Circuit Court have clearly fallen into error, with an erroneous conception of the effect of the decision in the Detroit Edison case. Manifestly, each case involving a determination of cost basis must stand on its own merits. The facts of the Arundel-Brooks and Detroit Edison cases are readily distinguishable and, notwithstanding the Circuit Court's statement in the Detroit Edison Co. case that its conclusion was in conflict with the Arundel-Brooks case, it is apparent from reading the Supreme Court's opinion in the former that there was no such conflict. The Supreme Court did not overrule the Arundel-Brooks case, but on the contrary agreed with the latter case as to the proper rule of determining "cost" of property in computing gain or fixing depreciation. In the latter case, it was held that under the facts cost basis was not confined to the taxpayer's actual cost, whereas in the Detroit Edison Co. case it was held, **under the facts in that case,** that actual cost to the taxpayer properly represented its cost basis.

The facts in the Arundel-Brooks case parallel the facts in the instant case. Those in the Detroit Edison Co. case are not at all similar.

The Arundel-Brooks case, 129 Fed. (2d) 762, presented an identical question, at least in so far as Sec. 113 (a) (2) of the 1936 Act was applicable, the Court deciding the issue on the basis thereof and without regard to the "contribution to capital" section above quoted [Sec. 113 (a)

(8) (B)]. In that case, two corporations participated in a transaction leading up to the erection of a concrete mixing plant, toward which one contributed to the other (the taxpayer) $20,000.00 of the total cost of some $40,000.00. A third corporation owned all the stock of the taxpayer corporation and 25% of the stock of the contributing corporation. (In the instant case, it will be remembered that Pease owned 45% of the stock of the taxpayer Auto Company, subsequently acquiring the remainder, and likewise owned 315 shares out of the 345 outstanding shares of stock in the Bank which charged off the Blacknall notes as a part of the agreed consideration for the conveyance to the Auto Company of the realty in question). The three corporations in the Arundel-Brooks case had interlocking directorates. The Commissioner, as did the Board of Tax Appeals, interpreted the term "cost" as used in the statute to mean the **taxpayer's cost and no other,** and denied the taxpayer the right to depreciate on the basis of the total cost, including the contribution, confining such right to the net cost to the taxpayer, exclusive of the $20,000.00 contribution. The Circuit Court of Appeals (Fourth Circuit), in reversing the Board and upholding the petitioner's right to depreciate on the basis of the total cost including the contribution, said in part as follows:

> "And even though part of the money was donated by an interested party, the total cost of the asset, not the net cost to the taxpayer, is the proper basis to be used in determining depreciation as well as gain or loss, if the asset belongs solely to the taxpayer."

The Circuit Court, in so holding, called attention to the fact, which is true in the instant case, that there was no evidence of a joint venture between the contributor and the taxpayer, and further said in its opinion:

> "To the contrary, the plant was erected by the petitioner for use in its own business. No consideration ever flowed from petitioner to Maryland Slag for the contribution. Nor was there any right, title,

> interest or control in or over the plant vested in Maryland Slag by virtue of the contribution. Thus, if petitioner cannot take a depreciation of the $20,000.00, no one can. Such a result would seem to violate the plain provisions of the statute, the ordinary dictates of common fairness, and the accepted standards of sound business practice."

The Arundel-Brooks case, plainly holds that in fixing "cost" of property as a basis for depreciation or computing gain or loss from a sale thereof, the statute **does not mean cost to taxpayer,** but does mean the **amount invested** in the acquisition or construction of the property by either the taxpayer, a donor, or a contributor, or all of them combined —in other words the entire amount of money expended in its acquisition.

In seeking to distinguish the case at bar from the Arundel-Brooks case, The Tax Court held that,

> "* * * * the Maryland Slag Co. did actually contribute $20,000.00 cash toward the erection of the plant, whereas in the instant case we would be unable to hold that either the Bank or Pease contributed anything of value toward the purchase price paid by Auto Company for the property in question."

As a predicate for such holding, in referring to the six Blacknall notes aggregating $24,567.11 charged off by the Bank, The Tax Court stated that there was no evidence that they had any value, the "inference" being to the contrary (R. 38, 39). On this point, the Circuit Court held that

> "The notes surrendered to the seller by the Bank were found by The Tax Court to be utterly valueless."

The "inference" thus drawn by The Tax Court, and upheld by the Circuit Court, was drawn from the mere fact that the notes were charged off by the Bank, pursuant to the agreement of it and Pease so to do in return for Blacknall's conveyance of the property. We submit that this holding and the inference so drawn by The Tax Court and the Circuit

Court are unjustifiable by and at variance to the stipulated facts. The notes were worth their face value as used. Blacknall owed the money, owned the $45,000.00 value in the property, and he paid his debts in full by the conveyance of the property. There is nothing in the record to suggest that Blacknall would have conveyed the property to the Auto Company but for (1) its assumption of the lien indebtedness thereagainst in the amount of $20,000.00, and (2) the discharge or surrender by the Bank (a corporation practically owned by Pease, the latter also owning 45 per cent of the Auto Company stock) of his unsecured notes aggregating some $25,000.00.

The case of **Detroit Edison Co.** vs. **Commissioner,** 131 Federal (2d) 619, affirmed by the Supreme Court in 319 U. S. 98 and solely relied upon by The Tax Court in support of its decision, and presumably by the Circuit Court, involved facts wholly dissimilar to those in the Arundel-Brooks and Nashville Warehouse cases and the case at bar. The Detroit Edison Company was a public utility corporation, engaged in the generation of electric energy and its distribution to the public. When applications for extensions were received from prospective customers, it would undertake to provide the service by requiring the applicants to pay the estimated cost of the necessary construction. The company sought to recover through depreciation, as a part of its **cost** of the properties, the amounts so paid by the customers, invoking the provisions of Section 113 (a) (2) and Section 113 (a) (8) (B) of the Act, relating respectively to gifts and contributions to capital. The Commissioner and Board of Tax Appeals disallowed the depreciation so claimed.

The Sixth Circuit Court, in affirming, denied that either provision was applicable, in the first instance on the ground that the funds involved were not gifts or gratuities under Section 113 (a) (2), but supported by considerations, the

customers expecting "full remuneration" by use of the electric energy, and in the second instance on the ground that the funds were to be used for the "express purpose of constructing improvements," could have been reclaimed by the prospective customers upon an abandonment of the project, and therefore could not be considered as a contribution to capital.

The Circuit Court did state in its opinion that its conclusion was in conflict with the Arundel-Brooks case, basing such statement (purely obiter dicta in view of the clear distinction between the two cases) entirely upon the proposition that

> "The word 'cost' as used in Section 113 (a) beyond question refers to the cost of the property to the taxpayer."

The Supreme Court granted certiorari for the reason, as stated in its opinion, **Detroit Edison Co.** vs. **Commissioner,** 319 U. S. 100, that the Circuit Court's decision "appeared" to conflict with the Arundel-Brooks case. That no **actual** conflict was found, with the exception of the incorrect statement of the law by the Circuit Court as above quoted, is clearly apparent from the Supreme Court's opinion. It affirmed the decision of the Circuit Court upon the ground that **under the facts** of the Detroit Edison Company case the funds involved were not subject to depreciation, either as gifts or as contributions to capital under the Sections invoked. However, the Supreme Court in effect overruled the above quoted proposition of law announced by the Circuit Court, interpreting "cost" to mean "cost to the taxpayer," in the following language:

> "A property may have a cost history **quite different from its cost to the** taxpayer. It may have been purchased for less or more than the original cost, or built by contract which called for payments on which the builder profited greatly or suffered great loss, but generally, and in this case, the Commissioner was in

> no error in ruling that the taxpayer's outlay was the measure of his recoupment through depreciation accruals."

Furthermore, in explaining the purpose of the law, the Supreme Court said:

> "The end and purpose of it all is to approximate and reflect the financial consequence to the taxpayer of the subtle effects of time and use in the **value of his capital assets.**"

And in commenting on the facts there involved, further said:

> "It is enough to say that it overtaxes imagination to regard the farmers and other customers who furnished these funds as makers either of donations or contributions to the Company * * * The payments were to the customer the price of the service."

The Supreme Court thus in effect agreed with the decision in the Arundel-Brooks case to the effect that the term "cost" as used in the statute refers to the **cost of the property** and not necessarily to the **cost to the taxpayer**, each case of course resting on its own facts. The Supreme Court did not in anywise overrule the Arundel-Brooks case, which would have followed as a matter of course had it concurred in the assertion by the Circuit Court that the latter's conclusion was "in conflict" with the Arundel-Brooks case. To the contrary, it inferentially approved and upheld the holding in the Arundel-Brooks case by the language as to "cost history" above quoted.

Cited in support of the decision in the Arundel case, is the case of **Nashville Warehouse & Elevator Corp. vs. Commissioner**, 105 Federal (2d) 883, likewise in point in the case at bar, wherein was involved the question of whether proceeds from an insurance policy, the property having been destroyed by fire, should, for the purpose of computing gain, be included in arriving at "cost" to the petitioner. The Board allowed only the "net cost to the petitioner", ex-

cluding the insurance money, and the Circuit Court in reversing and allowing a cost which included the insurance proceeds, said:

> "Whatever the source of the funds from which payment was made, the cost was $40,000.00."

In the case at bar, if the consideration contended for, including the six promissory notes charged off by Pease's Bank, was not actually paid in full by the Auto Company, then the amount unpaid was, through his Bank, contributed to it by Pease, a stockholder, precisely the same character of contribution as had been made in the Arundel-Brooks case, source considered, with no strings tied.

3. General Principles of Law Applicable With Citation of Authorities.

The essential nature of the transaction under examination in this cause was the purchase or acquisition by the Auto Company of the realty in question. Where such is the case, the well established rule is that the transaction must be viewed as a whole. It is thus well stated in **Commissioner** vs. **Ashland Oil & Refining Company**, 99 Federal (2d) 588, 591, certiorari denied, 306 U. S. 661:

> "It has been said too often to warrant citation that taxation is an intensely practical matter, and that the substance of the thing done and not the form it took must govern. * * * * And without regard to whether the result is imposition or relief from taxation, the Courts have recognized that where the essential nature of a transaction is the acquisition of property, it will be viewed as a whole, and closely related steps will not be separated either at the instance of the taxpayer or the taxing authority."

In the case of **Helvering** vs. **New Haven & S. L. R. Co.**, 121 Fed. (2d) 985, 988, certiorari denied, 315 U. S. 803, as to a reorganization there involved, the Court said:

> "As for the effort of the Commissioner to atomize the plan, as it were; i. e. to separate it into its several

> steps and treat the last as though it stood alone, it has been repeatedly repudiated."

In one of the cases probably most frequently cited in support of the rule, **Prairie Oil & Gas Co.** vs. **Motter,** 66 Fed. (2d) 309, it was said on page 311:

> "If a taxpayer sought to avoid a tax on the profits of such sale as this by asking the Commissioner to ignore the actualities, he would shortly and properly be reminded that taxation is an intensely practical matter and that the substance of the thing done, and not the form it took, must govern."

Other authorities holding to similar effect are listed as follows:

Commissioner vs. **Griffiths,** 103 Fed. (2d) 110, affirmed in 308 U. S. 355;
U. S. vs. **Collier, 105 Fed.** (2d) 420;
Berwind vs. **Commissioner,** 137 Fed. (2d) 451;
Early vs. **Southgate Corp.** 136 Fed. (2d) 217;
U. S. vs. **Phellis,** 257 U. S. 156; 66 L. Ed. 180.

Bearing in mind that the main issue here involved is the question of law as to the "cost" of the property upon which gain or loss arising from a subsequent sale should legally be computed, let us review the evidentiary sequence of the steps taken by the Auto Company in the purchase of this property as reflected in the fact findings of The Tax Court and the Circuit Court and which must, under the rule announced in the above cited cases, be viewed as a whole. They were as follows:

(1) That the fair market value of the property at the time of its acquisition by the Auto Company in 1922 was $45,000.00 is evidenced by the fact that the building on the land was valued in 1923 and for fourteen consecutive years thereafter at $25,000.00 for depreciation purposes in the income tax returns of the Auto Company, and such valuation was accepted by the Commissioner. This improved realty, with the building thereon aged an additional

seventeen years, sold in 1939 for $36,000.00, a fact which in and of itself supports a 1922 fair market value far in excess of the $20,000.00, to which the Commissioner confined the cost, and in line with Petitioners' contention.

(2) At the time of the conveyance Blacknall and his associates owned the property. He and his associate companies owed Hulick a $10,000.00 note secured by a first lien thereagainst, and Pease a $10,000.00 note secured by a second lien thereagainst. In addition to this lien indebtedness, he and his associate companies owed the Bank $24,567.16, evidenced by six unsecured notes.

(3) At the time of the conveyance, Pease owned 45 per cent of the Auto Company stock, subsequently acquiring the remainder. Pease likewise owned 315 shares out of the 345 shares of the capital stock of the Bank.

(4) The consideration paid and to be paid the Blacknall interests for the property, as recited in the deed itself, was "$10.00 and other valuable consideration," and "subject to all indebtedness thereon." The lien indebtedness amounted to $20,000.00, thus leaving a value in the property of $25,000.00 for which Blacknall was to be compensated by "other valuable consideration."

(5) At the time of the conveyance by Blacknall to the Auto Company it was orally agreed between him and his associate companies, on the one hand, and the Bank and Pease, on the other, that if Blacknall should have the property conveyed to the Auto Company, he and his associates would be released and discharged from any and all direct or indirect liability to either the Bank or Pease.

(6) Seven days after the date of the conveyance to the Auto Company by Blacknall, this undertaking and obligation on the part of the Bank and Pease so to release Blacknall and his associates from direct or indirect liability, was reduced to writing and signed by Blacknall, his

associate company, J. C. Blacknall Company (named as vendor in the Auto Company's deed), the Bank and Pease, conditioned only that no bankruptcy proceedings were instituted against Blacknall or his associates. Manifestly Blacknall, after having performed his agreement to convey, was requiring written evidence of the obligation on the part of the Bank and Pease to release him from liability on the unsecured notes.

(7) In its Federal income tax for the year 1922, of necessity filed prior to March 15, 1923, some three months after the conveyance by Blacknall to the Auto Company, the Bank charged off as a loss an indebtedness of approximately $25,000.00 against Blacknall and his associates, including the six notes referred to. In September, 1924, the said six notes were surrendered to Blacknall, he giving no further consideration therefor.

And thus was Blacknall compensated for the remaining $25,000.00 value in the properties conveyed by him to the Auto Company. Neither the Bank's charge off, pursuant to its and Pease's agreement so to do, nor the Bank's bookkeeping methods can alter the evident facts of the transaction, or the true cost of the property. Evidently Pease's purpose in charging off the notes on the Bank's books was two-fold. Primarily to comply with his written obligation to Blacknall, and secondarily to adopt such a bookkeeping method as would be beneficial to himself by creating a "loss" for his bank deductible from its income tax return. Blacknall owned the $45,000.00 value in the property and he received for it a total of $45,000.00, represented by the two secured notes against the property and the six notes charged off. As stipulated and found by The Tax Court, the facts demonstrate that Blacknall's six notes, discharged and surrendered by the Bank, were worth their face value as used. He owed the money and paid them in full by the conveyance of the property.

In the case of **Farming Corporation** vs. **Commissioner,** 11 B. T. A. 1413, the taxpayer had sold certain farms for which it received cash payments, first mortgages and three second mortgages in the total face value of $12,550.00. The second mortgages were not marketable save at a substantial discount, but were transferred to the corporation from which the taxpayer had purchased the farms and the taxpayer received credit therefor on his original purchase price in the amount of the face value of the mortgages. The taxpayer excluded the face value of the mortgages, so used, from its gross income. The Commissioner restored such value of $12,550.00 to gross income, and was upheld by the Board of Tax Appeals on the ground that the mortgages had been used in paying off the purchase price, and were therefore "worth their face value to the petitioner."

Similarly, in the case at bar, the six unsecured notes in question were used by the Bank and Pease to the extent of their face value in paying off a part of the purchase price demanded by Blacknall, and The Tax Court and the Circuit Court erred in holding that neither the Bank nor Pease, in charging off and surrendering the notes, contributed anything **of value** to the Auto Company's purchase price.

A slightly different course, if pursued by Pease, would have accomplished the same legal effect. The Stockholders of a corporation are of course the true owners of the assets thereof. Pease owned the Bank or 21/23 of its stock, and likewise owned 45 per cent of the Auto Company's stock, subsequently acquiring the remainder. If Pease had deposited the money in his Bank to the Auto Company's credit with which to pay the six Blacknall notes, and then the Auto Company had given the Bank a check in payment thereof, or if Pease had personally paid the notes to the Bank, taken them up and, acting for the Auto Company, surrendered them to Blacknall, the result

would have been the same. In either or any event, when the Auto Company, acting through its own officers as such, or through Pease who owned its stock and that of the Bank, relieved Blacknall from liability on the notes, the amount is plainly "cost" of the property. Pease decreased the value of his Bank stock by the amount charged off, but, by the same token, he increased the value of his Auto Company stock by acquiring property of an equivalent value. Blacknall simply conveyed his property in satisfaction of his debt to Pease, the conveyance being made to the Auto Company at the direction of Pease and his Bank. It is true that it resulted in a contribution to its capital stock, but at the same time it was an effectual payment by Pease on behalf of his Auto Company for the realty in question, as a part of the "cost" thereof, equally as much so as was the subsequent satisfaction of Blacknall's lien indebtedness of $20,000.00 against the property to which "cost" was confined by The Tax Court and the Circuit Court.

Hence, it is submitted that, in the light of the cases hereinabove cited, The Tax Court and the Circuit Court erred in not viewing collectively the related steps taken in the purchase of the property and in excluding from the "cost" thereof the six unsecured notes owed by Blacknall to the Bank, which as part of the consideration for the property, the Bank and Pease agreed to and did charge off and surrender to Blacknall.

Ancillary to the foregoing discussion, we further submit that

(1) The statute requires the value for the computation of depreciation to be the same as the basis for computing gain or loss in the event of sale (Section 114 (a), supra). The action of the Internal Revenue Department in accepting and agreeing upon the valuations made by the Auto Company in its income tax returns for fifteen consecutive

years following the purchase, allocating $25,000.00 to the building alone for purposes of depreciation, is in itself sufficient proof of that value.

James Mfg. Co. vs. Commissioner, 17 B. T. A. 205;

Farmers Cotton Oil Co. vs. Commissioner, 27 B. T. A. 105;

Couzens vs. Commissioner, 11 B. T. A. 1040;

Brand vs. Commissioner, 5 B. T. A. 297.

Furthermore, from an examination of these and related cases, it is apparent that there is no set formula for determining either "cost," or fair market value under Sections 113 (a) (2), any reliable evidence being acceptable in evidence thereof. It is likewise the law that knowledge of values by Internal Revenue Agents is imputed to the Commissioner. **Helvering vs. Schine Chain Theaters,** 121 Fed. (2d) 948. In the instant case, the Commissioner is in irreconcilable positions and therein has been upheld by The Tax Court and the Circuit Court. He fixes the 1922 "cost" for computing gain on the 1939 sale at $20,000.00, allocating $8,888.89 to cost of the land and $11,111.11 to cost of the building. Meanwhile, beginning with taxpayer's purchase in 1922 and for the fifteen following years, he has accepted a valuation on the building alone of $25,000.00 for depreciation purposes, which the law says shall be the same as the basis for calculating gain or loss from a sale, and has allowed during that time a total of $16,417.30 as depreciation, which is more than $5,000.00 in excess of what the Commissioner now claims was the cost of the building in 1922.

(2) Should it be held by this Court that the six notes of the face value of $24,561.16 charged off by the Bank were not properly a part of the "cost" of the property as paid by the Auto Company or on its behalf, nevertheless The Tax Court and the Circuit Court have erred in hold-

ing that for the computation of depreciation and gain from the 1939 sale of the property, the "cost" basis is limited to the $20,000.00 in lien indebtedness against the property actually paid off by the Auto Company, whereas under the very circumstance of such charge off the true and correct basis of cost would, under Section 113 (a) (2), be the fair market value at the time of the acquisition of the property by the Auto Company. The "cost" to the taxpayer **alone** is not the test.

Detroit Edison Co. vs. Commissioner, 131 Fed. (2d) 619; 319 U. S. 98;

Arundel-Brooks Corp. vs. Commissioner, 129 Fed. (2d) 762;

Helvering vs. New President Corp. 122 Fed. (2d) 92;

Helvering vs. New Haven Co., 121 Fed. (2d) 988; 315 U. S. 803;

Majestic Secuities Corp. vs. Commissioner, 120 Fed. (2d) 12;

Nashville Warehouse & Elevator Co. vs. Commissioner, 105 Fed. (2d) 990;

Park vs. Commissioner, 15 B. T. A. 106;

Perkins vs. Commissioner, 125 Fed. (2d) 150;

Robinson vs. Commissioner, 59 Fed. (2d) 1008;

Rosenbloom vs. Commissioner, 24 B. T. A. 763;

Biscayne Co. vs. Commissioner, 23 B. T. A. 731;

Knight vs. Commissioner, 28 B. T. A. 188;

McDonald vs. Commissioner, 28 B. T. A. 64;

Eggink vs. Commissioner, 7 B. T. A. 152;

Milton vs. Mack ıy, 11 B. T. A. 569;

Robertson vs. Commissioner, 5 B. T. A. 748.

(3) Taxing statutes should be construed and applied with a view of avoiding unjust consequences as far as pos-

sible. Neither the letter of the statute nor technical construction should defeat that purpose.

Farmers Loan & Trust Co. vs. Minnesota, 280 U. S. 204; 74 L. Ed. 371; 65 A. L. R. 1000;

Oats vs. First National Bank, 100 U. S. 239; 25 L. Ed. 580;

Legg's Estate vs. Commissioner, 114 Fed. (2d) 760.

(4) In the case at bar, the Petitioners have the burden only of showing that the computation of the income tax alleged to be due by them, as computed by the Commissioner and as affirmed by The Tax Court and the Circuit Court, is erroneous, and they do not have the further burden of establishing the **facts** upon which the tax may be correctly computed.

Helvering vs. Taylor, 293 U. S. 507; 79 L. Ed. 623;

Wagner & Son vs. Commissioner, 93 Fed. (2d) 816;

National Lumber & Tie Co. vs. Commissioner, 90 Fed. (2d) 216;

Hague Estate vs. Commissioner, 132 Fed. (2d) 215; 318 U. S. 787.

Therefore, if, in the judgment of this Court The Tax Court and the Circuit Court have made no finding from the stipulated facts of a fact essential to a correct computation of the taxes alleged to be due, this cause should be remanded for further hearing as to what **was** the **true** fair market value of the property when purchased by the Auto Company in 1922.

Commissioner vs. Laughton, 113 Fed. (2d) 103;

Seaside Imp. Co. vs. Commissioner, 105 Fed. (2d) 990; 308 U. S. 618;

Coosa Land Co. vs. Commissioner, 103 Fed. (2d) 555;

Andrews vs. Commissioner, 135 Fed. (2d) 314;

Esperson vs. Commissioner, 127 Fed. (2d) 370

In conclusion and in explanation of the plea for alternative and equitable relief, or an offset, urged in the lower courts by the transferees Petitioners Vandenberge, Blackburn and Wallace, we suggest that the same was grounded upon the fact that they severally reported and paid individual income taxes for the year 1939 on a liquidating dividend of $19,500.00, declared by the Auto Company as a result of the sale in that year of the property involved, each of the three reporting and paying taxes, in varying brackets, on $6,500.00 received from this source, the taxes so paid amounting in the aggregate to $680.82 (R. 36). This plea was denied by both The Tax Court and the Circuit Court (R. 40-42, 60-61). Such holding is doubtless correct under the decision of this Honorable Court in the case of **Commissioner vs. Gooch Milling & Elevator Co.**, 320 U. S. 418, and the claim for such equitable relief is therefore abandoned in so far as this particular proceeding is concerned.

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PRAYER

WHEREFORE, premises considered, Petitioners pray as in their foregoing Petition for Writ of Certiorari.

Respectfully submitted,

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